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NO. 75-779

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

PAUL C. JACK,

Petitioner,

vs.

DONALD F. BLACK, Judge of the Circuit Court of Wood County, West Virginia, P.G. HOYE, Commissioner of Public Institutions of the State of West Virginia, and LLOYD E. HAYNES, Warden of the West Virginia Medium Security Prison at Huttonsville, West Virginia,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William L. Jacobs
Citizens Bank Building
P.O. Box 185
Parkersburg, W. Va. 26101

Attorney for Petitioner

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, Paul C. Jack, respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Court to review the decision of The United States Court of Appeals for the Fourth Circuit, as follows:

OPINION DELIVERED IN COURT BELOW

The United States Court of Appeals for the Fourth Circuit in Case No. 75-8038 styled as above indicated rendered the following Memorandum Decision:

"A review of the record and of the district court's opinion discloses that an appeal from the order of the district court refusing habeas corpus relief would be without merit. Accordingly, a certificate of probable cause to appeal is denied, and the appeal is dismissed for the reasons stated by the district court. Jack v. Black, et al, C/A No. 74-264-E (N.D. W.Va., Jan. 10, 1975)."

The United States Court of Appeals for the Fourth Circuit entered an order denying the Petition for Rehearing.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The Memorandum Decision above quoted was entered on October 30, 1975. The order denying the petition for rehearing was entered on November 24, 1975.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, Section 1254 of the United States Code.

QUESTIONS PRESENTED FOR REVIEW

Does a State Legislature have the right and authority to delegate to a State or Federal agency the power to determine what is or is not a crime?

Does the West Virginia State Legislature have the right and authority to authorize the West Virginia Board of Pharmacy and/or the U.S. Bureau of Narcotics and Dangerous Drugs to determine in futuro what drugs shall appear on the controlled substance lists of West Virginia and thereby determine what conduct shall and shall not constitute a felony?

Is not the attempted delegation of authority to administrative agencies to determine what shall and what shall not constitute a felony a violation of the Separation of Powers Doctrine of the Federal and State Constitutions?

STATUTE INVOLVED

The statute involved is W.Va. Code, Section 60A-2-201, as amended (set forth verbatim in the appendix) It provides that the "State Board of Pharmacy shall administer this chapter (The Controlled Substances Act) and may add substances to or delete or reschedule all substances" thereby giving the State Board of Pharmacy the authority to determine what acts shall and what acts shall not constitute a felony.

CONCISE STATEMENT OF THE CASE

Since the filing of the petition for a writ of habeas corpus, in the U.S. District Court, the West Virginia Legislature has amended West Virginia Code, Chapter 60A-2-201 et seq., effective March 9, 1975, so as to take away from the West Virginia State Board of Pharmacy the right to "place a substance" on the list of controlled substances and to give said body the authority to "recommend to the Legislature that a substance be placed" on the controlled substance lists, thereby eliminating the unconstitutional delegation of authority contained in the statute in effect at the time of the indictment of the petitioner herein. The West Virginia Legislature expressly acknowledged that it was changing the statute by reason of its belief that the indictment under which the petitioner herein was indicted was unconstitutional and void.

The West Virginia Supreme Court of Appeals, discussing the Dangerous Drugs Act, which was the forerunner of the Controlled Substances Act of West Virginia, dealt with the precise question which is present in this case, that is, the action of the Legislature in attempting to confer prospective authority upon an arm of the executive branch of the government, that is, the West Virginia Board of Pharmacy, to determine what shall and what shall not constitute a crime in the following language contained in the syllabus points of the case of State versus Susan Grinstead, ___W.Va._____, 206 S.E. 2d 902, as follows:

"1. Although statutes adopting laws or regulations of other states, the federal government, or any of its agencies, effective at the time of adoption, are valid, attempted adoption of future laws, rules or regulations of other states, or of the federal government, or of its agencies, is unconstitutional as an unlawful delegation of the legislative power. W.Va. Cons. art. VI, §1 and art. V §1.

"2. The Legislature cannot delegate its authority to enact criminal laws to an agency which is a unit of the executive branch of State government, nor can it, under the guise of colorable delegation, permit the Board of Pharmacy to adopt a federal law which has not been given prior approval by the Legislature.

"3. West Virginia Code, Chapter 16, Article 8B, Section 1(l)(d), as amended, is constitutionally invalid as an attempted delegation to the Board of Pharmacy of the power to declare unlawful drugs, the possession, sale or delivery of which may be designated as dangerous or habit forming by the federal government prospectively, in futuro, and without limitation; the decision of State ex rel. Scott v. Conaty, W.Va. 187 S.E. 2d 119 (1972), to the contrary, is, in this respect, overruled.

"4. The constitutional prerequisite to a valid statute is that the law shall be complete when enacted."

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the first instance is the exhaustion of State Remedies and violation of the due process clause and Separation of Powers Doctrine under the United States Constitution.

ARGUMENT

It would seem that if ever a case were presented to a Court to test whether the law is the "refined wisdom of the ages" in order to right a wrong which has occurred, the instant case would be a classic example. The overwhelming weight of the evidence in this case clearly showed that the petitioner, was not guilty of the crime

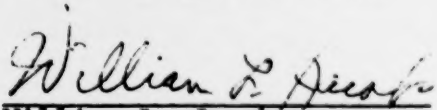
charged. The jury which convicted the petitioner was so obviously inflamed by the fact that this was a "drug case" that it brought in convictions in a wholesale manner, including conviction in the instant case after eighteen minutes of deliberation in a case in which the jury should have taken no more than eighteen minutes in which to render a verdict of acquittal.

The Court's attention is respectfully directed to page 75 of the record in which the President of the American Polygraph Assocation of Akron, Ohio, reported after a polygraph test upon the petitioner that "it is the conclusion of this examiner that Mr. Jack is not guilty of the crime for which he is charged" and to page 78 of the record in which one of the largest and most reputable polygraph testing agencies in the contry, the John E. Reid Agency of Chicago, Illinois, reported that the petitioner was telling the truth when he answered that he had not sold the marijuana as charged in the indictment.

It is very earnestly suggested to the Court that there has been a grave miscarriage of justice in this case resulting in the ruination of an honored and respected member of the Parkersburg community who had no prior arrest records and put his reputation for truth and veracity and for being a law abiding citizen on the line by offering proof of same with no proof to the contrary having been offered by the State of West Virginia in the case.

The statute under which he was indicted is clearly unconstitutional and the Writ prayed for should be awarded, in order to be consistent with the decision of the Supreme Court of Appeals of West Virginia and this honorable court under the due process and separation of powers doctrines.

Respectfully submitted,



William L. Jacobs
Counsel for Petitioner
Citizens Bank Building
P.O. Box 185
Parkersburg, W. Va. 26101

APPENDIX

STATUTE INVOLVED

W.Va. Code §60A-2-201 AUTHORITY TO CONTROL

(a) The state board of pharmacy shall administer this chapter and may add substances to or delete or reschedule all substances enumerated in the schedule in sections 204,206,208, 210, or 212 (§§ 60A-2-204, 60A-2-206,60A-2-208, 60A-2-210, or 60A-2-212), pursuant to the provisions of article three (§29A-3-1 et seq.), chapter twenty-nine-A of this Code. In making a determination regarding a substance, the state board of pharmacy shall consider the following:

(1) The actual or relative potential for abuse;

(2) The scientific evidence of its pharmacological effect, if known;

(3) The state of current scientific knowledge regarding the substance;

(4) The history and current pattern of abuse;

(5) The scope, duration, and significance of abuse;

(6) The risk to the public health;

(7) The potential of the substance to produce psychic or physiological dependence liability; and

(8) Whether the substance is an immediate precursor of a substance already controlled under this article.

(b) After considering the factors enumerated in subsection (a), the state board of pharmacy shall make findings with respect thereto and issue a rule controlling the substance if it finds the substance has a potential for abuse.

(c) If the state board of pharmacy designates a substance as an immediate precursor, substances which are percursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the state board of pharmacy, the said board shall similarly control the substance under this chapter after the expiration of thirty days from publication in the "Federal Register" of a final order designating a substance as a controlled substance or rescheduling or deleting a substance, unless within that thirty-day period, the state board of pharmacy objects to including, rescheduling, or deletion. In that case, the state board of pharmacy shall

publish the reasons for objections and afford all interested parties an opportunity to be heard. At the conclusion of the hearing, the state board of pharmacy shall publish its decision, which shall be final unless altered by statute. Upon publication of objection to inclusion, rescheduling, or deletion under this chapter by the state board of pharmacy, control under this chapter is stayed until the state board of pharmacy publishes its decision. Each such publication shall be published as a Class I-O legal advertisement in compliance with the provisions of article three, (§59-3-1 et seq.), chapter fifty-nine of this Code, and the publication area for such publication shall be each county of the State.

(e) Authority to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco as those terms are defined or used in other chapters of this Code nor to any nonnarcotic substance if such substance may under the "Federal Food, Drug and Cosmetic Act" and the law of this State be lawfully sold over the counter without a prescription. (1971,c.54.)